UNITED STATES DEPARTMENT OF JUSTICE Ref. No. 376
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

NITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding Case No. 90100179
UBOIS FARMS, INC., Respondent.	)	

FINAL DECISION AND ORDER
(September 24, 1991)

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(September 24, 1991)

MARVIN H. MORSE, Administrative Law Judge

APPEARANCES: Nancy R. McCormick, Esq. for the Complainant.
Rodney W. Smith, Esq. for the Respondent.

I. INTRODUCTION

The Immigration Reform and Control Act of 1986 (IRCA)[1] adopted significant revisions in national policy on illegal immigration. IRCA introduced civil and criminal penalties for violation of prohibitions against employment in the United States of unauthorized aliens. Civil penalties are authorized when an employer is found to have violated the prohibitions against unlawful employment and/or the record-keeping verification requirements of the employer sanctions program.

Salvador Bolano Deras, knowing that the aliens were or had become unauthorized to work in the United States. INS also charged Respondent with ninety-four (94) violations of the employment verification (paperwork) requirements of 8 U.S.C. §1324a(a)(1)(B). The paperwork violations were all charged as failure to prepare, maintain or present the employment verification form (Form I-9) issued by INS pursuant to its authority to implement 8 U.S.C. §1324a. 8 C.F.R. §274a.2.

Respondent timely requested a hearing before an administrative law judge. 8 U.S.C. §1324a(e)(3)(A). On June 11, 1990, the Office of the Chief Administrative Hearing Officer (OCAHO) issued its Notice of Hearing advising Respondent of the filing of the Complaint on June 1, 1990, and of my assignment to the case.

On July 25, 1990 INS filed a motion for default, seeking judgment for failure by Respondent to timely answer the Complaint. On July 27 I issued an Order to Show Cause Why Judgment by Default Should Not Issue. On July 31, 1990, concededly aware of the July 27 Order, but allegedly not yet having received it, Respondent filed its Reply to Complainant's motion and an Answer to the Complaint, denying every allegation save that of jurisdiction, and raising ten affirmative defenses. In response to the Show Cause Order, Respondent on August 1, 1990 filed a motion to accept its reply to Complainant's motion and its Answer to the Complaint. Complainant rejoined, filing on August 8, 1990 a Memorandum of Law in support of its default judgment motion.

By Order issued August 29, I denied the motion for default judgment, holding that "there is neither a total failure to answer the Complaint, nor are these such egregious circumstances as to mandate a default judgment." 1 OCAHO 225 at 3. On September 7, 1990, INS filed a Motion to Strike Affirmative Defenses. Respondent's reply and objection to the motion was filed on September 20. I granted in part Complainant's motion by Order dated September 28, 1990.

Telephonic prehearing conferences were held on October 25, December 7, 1990, and February 4, 1991. Complainant filed a Motion for Partial Summary Decision on January 4, 1991 to which Respondent filed its opposition on January 22. By Order dated January 29, 1991 I denied Complainant's motion, finding that there remained in dispute "a genuine issue of a material fact." Order Denying Complainant's Motion For Summary Decision at 3.

On February 12, 1991 Complainant filed a Memorandum of Law Regarding Admissibility of Forms I-213 and Sworn Statements in anticipation of evidentiary objections by Respondent. A three day evidentiary hearing was held in West Palm Beach, Florida, February 19 through 21. Following the grant to Respondent of its requested extensions of time to file its brief, the last post-hearing brief was filed on June 4, 1991.

III. STATEMENT OF FACTS[2]

DuBois Farms is a large, vegetable growing business with its corporate office located at 5450 Flavor Pict Road, Boynton Beach, Florida. Since November 1986, Respondent has employed approximately seven thousand individuals. Although there have been number of corporate entities with the DuBois name, e.g., DuBois Farms, DuBois Growers, DuBois Harvesting, DuBois Brothers and DuBois Produce, only DuBois Farms and DuBois Growers were operating during the relevant time period, Fall, 1989.

Respondent's field office off Highway 441 in Boynton Beach in rural Palm Beach county, includes a compound consisting of a packing house, employment trailer office, and pavilions. The location is marked by a sign, "DuBois Farms, Inc." Exh. 12.

Every morning before 7:00 a.m. bus loads of agricultural workers arrive at the DuBois Farms compound. The buses are independently owned, sometimes by Respondent's crewleaders, occasionally by freelancers who transport employees and prospective employees for several growers in the area. In some instances, the buses "[carry] a laborforce, . . . for another jobsite other than DuBois Farms." Tr. 511.

Hiring authority is retained by the DuBois Farms owners; Valjean Haley, general manager; Gordon Cooper, field supervisor, and Jim Miller, personnel supervisor who was succeeded by Timothy Gilmond in February, 1990.

Gilmond described, and Haley substantially confirmed the hiring process at DuBois Farms in the Fall of 1989. Upon arrival at the compound, occupants of each bus are allowed off the bus to obtain drinking water and paper towels. The putative workers th reboard the bus. A farm crewleader or representative boards t bus to verify the identification cards of the employ the names on a crew list of employees previously veri office. Employees have valid Florida Fruit and Vegetab Association (FFVA) identificatio that the individual has been pr FFVA, and has valid work author by a head count against the crew

New applicants with apparent work authorization get off the bus for processing. Persons who are immediately rejected for work because of lack of documentation remain on the bus with the employees. Those who are rejected after documentation review

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2 The facts discussed in this section also form the basis for findings and conclusions in sections IV-VI, infra, where, to avoid redundancy, they are not repeated.

at the processing center, as well as newly processed employees, are later transported to the fields by pick-up truck or van to either return to their buses or to work, respectively.

For at least two reasons, rejected workers are transported to the fields where they remain all day until the bus returns them to the area where they live. First, Respondent does not want undocumented individuals loitering around its processing center. Second, the buses that transport the workers are not owned by DuBois Farms. The bus owners take the individuals to the compound, to the field, and at day's end to their living area. None of the buses return from the fields during the workday unless there are a large number of new and rejected workers to be transported.

Some unauthorized individuals make their way into the fields. A number, if not all of them gain access by assuming false identities, sometimes using documents of actual employees. For example, some aliens were "found to be on [a] crew under the pretense that they were different individuals." Tr. 595. False documents are received by DuBois Farms weekly, "[I]t's a big problem." Tr. 475.

During the Fall, 1989 employees of Respondent were paid weekly by check. They earned: $3.75 per hour for field laborers, $4.00 per hour for packing house personnel, $4.50/$4.75 per hour for tractor drivers, and $5.00 per hour for crewleaders, less $0.25 per hour for individuals with living quarters at DuBois Farms. Crewleaders, who are also bus owner/drivers, are paid $3.25 per head for transportation of laborers who are hired and employed by Respondent.

A. Apprehension of unauthorized aliens

On two dates approximately a month apart in the Fall of 1989, U.S. Border Patrol agents boarded buses leaving Respondent's compound, arresting a total of six aliens unauthorized for employment in the United States. The first stop on October 27, 1989 resulted in the arrest of five undocumented aliens. The second stop on November 22, 1989 netted one undocumented alien. Of the six aliens, Respondent is charged with unlawful employment of two (Exhibit A to the Complaint). All six are included in the total of ninety-four violations for failure to prepare and present Forms I-9 (Exhibit B to the Complaint).

1. Events of October 27, 1989

In the early morning of October 27, 1989 four U.S. Border Patrol agents were on patrol in two marked Border Patrol vehicles in the Highway 441 area near the DuBois Farms compound. The agents had apprehended illegal aliens in the surrounding area on prior occasions. Senior Agent Matthew Zetts and Agent Danny Payne

were in one vehicle; Agents Steven Toth and David Kueber were a short distance away in a second vehicle.

Agents Zetts and Payne saw several buses leave Respondent's compound and turn southwest on Highway 441 towards the fields. The agents had previous experiences with similar farm labor vehicles transporting illegal aliens. For that reason, the manner of dress of Hispanic-looking occupants of the buses, and the time of day, the agents stopped the buses, inquired as to the immigration status of the occupants, and asked for whom the drivers were transporting laborers. Agents Toth and Kueber, arrived in response to a call for back-up. They also boarded buses and made similar inquiries. The bus drivers said they were transporting laborers for DuBois Farms; none of the drivers testified at hearing.

Between thirty and forty individuals lacking employment documentation were removed from the buses for further interrogation. Only five who admitted that they were in the United States illegally were taken into custody and processed for deportation at the Riveria Beach Border Patrol Station. The entire operation, from the stopping of the first bus to the departure to the border patrol station lasted between twenty and thirty minutes.

Each agent interviewed and processed an arrested alien. Part of the processing included the preparation of a Record of Deportable Alien (Form I-213) and the taking of a sworn statement (Forms I-215B and/or I-263C). Of the five arrestees, only Jose Salvador Bolano Deras is included in the unlawful employment charge. Bolano Deras and the other four, Luis Juan Sebastian, Miguel Juan Martin, Alonzo Joaquin Perez, and Manuel Manuel Cruz, are included among the 94 named as lacking Forms I-9.

INS also arrested on this date aliens working at T. J. Turf Farms, a landscaping operation that sells turf sod.

2. Events of November 22, 1989

unauthorized aliens, but found none. Payne acknowledged that they were also "welcome to go onto [Respondent's] fields." Tr. 308.

At the Riviera Beach Patrol station the agents processed the single arrested alien, Pedro Pedro.

B. Forms I-9 inspection

Agent Zetts initiated an employer sanctions investigation of DuBois Farms on October 27, 1989 as a result of the apprehension of aliens near the compound that day. INS served a subpoena duces tecum on Respondent on December 8, 1989. The subpoena commanded the owner, operator or other authorized agent of Respondent to appear at the Riviera Beach Border Patrol station on December 14, 1989, "to give testimony in connection with a[n employer sanctions] compliance investigation" and to bring to the inspection "[a]ll form(s) I-9" and other payroll documentation. Exh. J.

On December 13, Valjean Haley and Al Helm, on behalf of Respondent, separately contacted agents of the INS Border Patrol in Riviera Beach to discuss the upcoming Forms I-9 inspection. Haley telephoned Agent Zetts and asked him as a matter of convenience to conduct the inspection of the numerous requested documents, exceeding 8,000 pages, at DuBois Farms. Zetts denied the request. Haley then requested an extension of time in which to compile all the requested documentation; Zetts granted a one day extension.

Al Helm, Manager of Field Services for FFVA located in Orlando, Florida, had prior contact on behalf of FFVA with Assistant Chief Border Patrol Agent Michael Sheehy, the agent responsible for review and approval of employer sanctions cases. Helm telephoned Sheehy on December 13 on behalf of Respondent, informing him that the FFVA had begun in October to complete Forms I-9 for Respondent. Helm "told him that we had some of the records, the I-9's for DuBois Farms because we had taken them."[3] Tr. 388.

Sheehy knew this was the first audit of Respondent's records. Recalling the conversation with Helm, Sheehy had no recollection, but did not deny, that he told Helm it was "no problem" if these documents were not produced at the time of inspection. Tr. 343. Helm believed Sheehy had told him "no problem." Sheehy acknowledged that Helm told him FFVA "had just started completing

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[3] Quoted references to Forms I-9 which erroneously appear as "I-9's" are understood to be in the plural, I-9s, and not the possessive.

I-9's," leading Sheehy to believe that at the time of the inspection, "quite a number of I-9's may not be presented and there would be a claim made that Florida Fruit and Vegetable had those I-9's in their possession. . . ." Tr. 340.

On December 15, 1989 Agent Zetts, with Haley present, reviewed some of the Forms I-9 and other documents, including payroll records, provided by DuBois Farms. Haley gave Zetts the September 27, 1989 contract for FFVA preparation and completion of DuBois Farms' Forms I-9 (Exh. 11), and a listing of employees processed by FFVA for I-9s on December 12, 1989 (Exh. 10). During the more than three-hour meeting Haley renewed his displeasure, previously expressed to Zetts upon requesting the extension, that INS had issued a subpoena. Respondent, according to Haley, would have voluntarily complied with an INS request for the paperwork. According to Zetts, Haley told him that while FFVA may have duplicate I-9s, those presented were the only I-9s of DuBois Farms.

Agent Zetts retained the Forms I-9 and related documents for further review. Haley got back the DuBois Farms materials on January 5, 1990. Zetts subsequently prepared a list of proposed violations and a Memorandum of Investigation resulting in the NIF. After the NIF was served, INS received additional Forms I-9 from Respondent.

C. Notice of Intent to Fine

The NIF, issued January 10, 1990, incorporated into the Complaint by reference, alleged (as Exhibit A) two violations of 8 U.S.C. §1324a(a)(1)(A) for hiring or, alternatively, §1324a(a)(2) for continuing to employ, unauthorized aliens, i.e., Carlos Pedro Pedro and Jose Salvador Bolano Deras, knowing them to be unauthorized to be employed in the United States. INS assessed the penalty for each unlawful employment allegation at $1,000.

The Form I-9 paperwork violations (ninety-four allegations of failure to prep the employment eligibility verification paperwork allegations charged Respondent I-9s for the individuals named in the two unlaw-- allegations charges, assessed at $500 each. The next four specified the individuals who, according to INS, had been arrested but who were the subject only of paperwork allegations, assessed at $400 each. The remaining eighty-eight paperwork allegations were assessed at $200 each, for a total civil money penalty of $22,200. Agent Sheehy set the amount of penalties. In arriving at the paperwork penalties he considered the statutory factors at 8 U.S.C. §1324a(5); 8 C.F.R. §274a.10(b)(2).

IV. DISCUSSION

A. Knowing Hire of and/or Continuing to Employ Carlos Pedro Pedro and Jose Salvador Bolano Deras

Title 8 U.S.C. §1324a(a)(1)(A) makes it unlawful for a person or other entity to hire for employment in the United States an alien, knowing the alien is unauthorized, as defined at 8 U.S.C. §1324(h)(3), with respect to that employment. Title 8 U.S.C. §1324a(a)(2) provides that it is unlawful for an employer "to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."

Complainant charges Respondent with violating 8 U.S.C. §1324a(a)(1), or in the alternative §1324a(a)(2) as to the employment of Carlos Pedro Pedro and Jose Salvador Bolano Deras. Complainant must prove by a preponderance of the evidence that DuBois Farms hired the two workers, or continued to employ them, knowing that they were not authorized to be employed in the United States. 8 U.S.C. §1324a(e)(3)(B); U.S. v. Mester Mfg. Co., 1 OCAHO 18 (6/17/88), aff'd Mester Manufacturing Co. v. INS, 879 F.2d 561 (9th Cir. 1989).

1. General admissibility and reliability of Forms I-213 and aliens' sworn statements (Forms I-215B and I-263C)

As to each of the two, Complainant introduced the Record of Deportable Alien, INS Form I-213, and Record of Sworn Statement in Affidavit Form, INS Form I-215B. Exhs. F, G, H, and I. It is undisputed that these individuals were unauthorized for employment in the United States. The critical issue is whether they were employees of Respondent. Both aliens are said to have asserted that they were employees of DuBois Farms. Complainant supports the exhibits by the agents' testimony that they took the aliens off buses as they were driving out of the DuBois Farms compound, with remarks by unidentified bus drivers that they were ting Respondent's employees, and by other passengers that re illegals on board.

ondent contends the I-215B statements are "inherently is and internally inconsistent," arguing that INS failed that the two individuals "ever existed." Resp. Brief at

he close of Complainant's case, Respondent moved to the two unlawful employment allegations, claiming of its fifth amendment due process rights, and the sixth privilege that witnesses against it testify, subject to mination. Complainant did not call as witnesses the ls on whose employment the allegations were based. I

reserved ruling on the motion until all the evidence was received. I deny the motion for the reason that in this administrative adjudication pursuant to the Administrative Procedure Act (APA) hearsay evidence is admissible, and not excludable per se. See 8 U.S.C §1324a(e)(3)(B) (employer sanctions hearing is conducted in accordance with the APA, 5 U.S.C. §554).

The die in favor of admissibility, as distinct from assessing the weight of the evidence, was cast in 1946 with enactment of the APA. Title 5 U.S.C. §556(d) applies to any hearing required by section 554: "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." Material and relevant evidence is admissible, including the sworn statements of unavailable alien witnesses. See 28 C.F.R. §68.38(b) (OCAHO regulations). I do not understand that admissibility of the Forms I-213, I-215B and I-263C implicates constitutional or other infirmities.

Mester, 1 OCAHO 18, adjudicated the first 8 U.S.C. §1324a question of admissibility of, and reliance upon, such hearsay documentary evidence introduced against alleged employers of unauthorized aliens. Acknowledging that these documents are often at "the margin of trustworthiness for evidentiary purposes," such hearsay is admissible where internally and mutually consistent, "reasonably free from patent error," and a knowledgeable witness testifies in support, such as the arresting/attesting officer or the alien involved. Id. at 26 n. 20. See U.S. v. Mr. Z Enterprises, 1 OCAHO 288 at 21-23 (1/11/91) (liability under 8 U.S.C §1324a may be based upon hearsay statements of unavailable witnesses without violating the sixth amendment right to confrontation). Applying the Mester test as to reliability, the credibility of entries on Forms I-213 and Forms I-215B and I-263C will be weighed in context of the totality of the

To the extent that I may be suggested that such hearsay do hearsay exceptions to the Federal I think they are not. Cf. Mester, 1 OCAHO 18, 25-26 n. 26 (1990) I-213 and I-215B admissible as public records, but not relied on). I think the better view is that they do not qualify as public records (Fed. R. Evid. 803(8)) or reports and information obtained in the regular course of business (Fed. R. Evid. 803(6)). Forms I-213 are in the nature of police blotters. Forms I-215B and I-263C are ex parte statements of arrested aliens prepared, in what is for them a hostile environment, typically through INS translation without participation of third-party interpreters. They are introduced in our proceedings not against the declarants but against their putative employers.

INS urges a practical reason for use of affidavits and other documents in lieu of testimony by the aliens as witnesses in cases before administrative law judges, i.e, its legal obligation to effect deportations within a prescribed time-frame. Inconsistent with that claim, however, INS suggests Respondent might have been able to produce the aliens. Compl. Brief at 7-8. I reject the implication that INS can have it both ways.

Not having explained the whereabouts of the aliens, its failure to produce them at hearing, or its other options, INS has failed to persuade that the inability to cross-examine the aliens is the fault of DuBois Farms. The Supreme Court made clear in N.L.R.B. v. Florida East Coast Railway Co., 410 U.S. 224 (1973) that every statutory administrative adjudication need not be a Section 554 formal adversarial hearing. See Mathews v. Eldridge, 424 U.S. 319, 342-43 (1976); Mester, 879 F.2d at 569. Hearings under 8 U.S.C. §1324a, however, inescapably implicate 5 U.S.C. §554, invoking opportunity for cross-examination. The sufficiency of Complainant's reliance on such documentary evidence must be assessed in that context.

2. Forms I-213 and I-215B of the alleged unlawful employees

Acknowledging admissibility of the documentary evidence is hardly an invitation, however, to dignify such materials as probative, absent, as here, any showing as to the unavailability of the aliens. Failure by INS either to make the aliens available for examination by Respondent or to establish their unavailability requires the trier of fact to closely scrutinize the documentary evidence. Where such materials are not internally or mutually consistent, and reasonably free of patent error, testimony by the arresting officer is insufficient to provide them probative weight. Mester, 1 OCAHO 18, 26 n. 20.

Carlos Pedro Pedro's I-215B statement is that he was paid by check every Friday and received wages of $3.50 per hour. Field laborers, however, such as in the employments at issue, are paid $3.75 per hour, unless they are housed by DuBois Farms. There is no suspicion on this record that any of the alleged unauthorized hires was housed by Respondent. Moreover, Respondent's bookkeeper testified and Complainant agreed that no one by the name of Pedro Pedro ever appeared in the pay records of DuBois Farms.

Respondent argues that while Pedro Pedro's I-215B states that he was hired by a "Miguel Pablo," Complainant failed to establish that Miguel Pablo was a DuBois Farms employee. Respondent correctly notes an internal inconsistency, an unexplained anomaly, in the statement, i.e., the alien recites he was hired on November 21, 1989 (one day before he was arrested), but that he was paid by check and worked a forty hour week.

I find the I-215B to be internally inconsistent with the conditions of employment provided by Respondent. There is evidence that "Miguel Pablo", the person said to have hired [illegible], is a crewleader for, or otherwise an employee of Respondent. [illegible] does not sustain its burden of establishing employment [illegible] the uncorroborated statement of the alien declarant that he was employed by that entity. Additional inconsistencies in [illegible] Pedro's documentary materials as well as those of the [illegible] arrestees are discussed, infra, at section IV. B. 2. [illegible] circumstantial evidence surrounding the arrest of the alien in November 22, 1989, who by his own statement reportedly had worked but one day for Respondent, is insufficient to carry Complainant's burden.

As to Jose Salvador Bolano Deras, Respondent identifies two inconsistencies in the I-215B: (1) the rate of pay at $4.00 per hour by check, and (2) the laying of sod and irrigation pipe as the type of labor performed. The rate of pay is inconsistent with the wage rate paid by DuBois Farms for field labor. Respondent's unrebutted proof is that it had never been in the sod business, and uses subsurface irrigation which does not involve the manual laying of pipe. Also, on the day that Bolano Deras was apprehended, INS arrested individuals employed by T.J. Turf Farms, an entity that sells turf sod.

As with Pedro Pedro, it is agreed that there is no pay record that Bolano Deras was ever employed by Respondent. The alien stated that he was hired by "Tomas Jimenez", a crewleader at DuBois Farms, a week before INS arrested him. Those crewleaders who are also owner-drivers transport field labor but have no hiring authority. Understandably, an owner-driver crewleader may be believed by a laborer to have hired him.

Employment at T.J. Turf Farms is consistent with the Bolano Deras statement that his work consisted of laying sod and irrigation pipe. His rate of pay was inconsistent with Respondent's pay scale. Whomever this alien may have worked for on October 27, 1989, I am unable to conclude on this record that it was DuBois Farms.

As to the arrest on November 22, Agent Payne was told by "people" who were on board the bus that undocumented workers had already "been pulled off the buses." Tr. 286. Zetts was told by two detainees that DuBois crewleaders were sorting out the undocumented workers. Tr. 159. In contrast, consistent with Respondent's practices of keeping illegals in the bus, agents found none in the compound. Indeed, statements attributed to unidentified drivers and passengers that illegals were on the buses is consistent with the finding that there was a mixed population on the buses of legal workers and illegals rejected for work.

INS relies on its cross-examination of Respondent's witness Timothy Gilmond, to the effect that every one on a bus exiting the DuBois Farms compound and heading to the fields is an employee of Respondent. On redirect examination, however, Gilmond recalled that immediately rejected individuals also remained on the buses. Corroborated by Haley's assertive and fairly certain recollection, there is no serious doubt that there was a mixed population on the buses.

I find that individuals who had been rejected for employment and others aboard who had no relationship to DuBois Farms were mixed in with Respondent's field laborers on the buses when they were intercepted leaving the compound on October 27 and November 22, 1989. That the chaos created by Respondent's personnel practices may occasion difficulty for it and for INS in policing its obligations as an employer under IRCA is not per se a basis for finding culpability under 8 U.S.C. §1324a. Here, there is no suggestion that Respondent skewed its practices in order to defeat the employer sanctions program.

INS has failed to persuade by a preponderance of the evidence that on the dates in question either of the two aliens were employees of DuBois Farms. The finding that the buses leaving the compound for the fields carrying a mixed population of employees and rejects is significant but not critical. Had they transported only employees I would be more constrained to find corroboration for the documentary materials. Even so, however, these documentary proxies for testimony of the aliens remain dubious in light of the internal inconsistencies and incongruities with proof of pay rates and practices, field laborer occupational activities and the fact that they did not appear on the payroll. See, e.g., Mester, 1 OCAHO 18 at 24-29 (rejecting employer liability as to a pseudonymous individual).

workers for employment where it is shown that they were in fact so employed. Constructive knowledge, for example, is sufficient to sustain a charge of knowingly hiring an unauthorized alien. Mester, 1 OCAHO 18, aff'd 879 F.2d 561; U.S. v. Collins Food Internat'l, 1 OCAHO 123 (1/9/90); aff'd 1 OCAHO 129 (2/8/90); U.S. v. New El Rey Sausage Co., 1 OCAHO 66 (7/7/89); modified by CAHO, 1 OCAHO 78 (8/4/89), aff'd New El Rey Sausage Co., Inc. v. INS, 925 F.2d 1153 (9th Cir. 1991). A showing of specific intent to violate the statute is not necessary to sustain the charge. U.S. v. Buckingham Limited Partnership, 1 OCAHO 151 (4/6/90).

The record does not suggest that the crewleaders at DuBois Farms had explicit or direct hiring authority. Rather, INS asserts that they had "apparent authority" to hire. INS regulations define an employer as anyone who directly or indirectly engages the labor of an individual for employment. 8 C.F.R. §274a.1(g).

This case, however, does not involve imputing to or assessing an employer with knowledge of others as to the unauthorized status of an employee but rather with the threshold question whether named individuals were or were not employees. On this question, as appears from the discussion above, Complainant's proof is wanting. INS quite unexceptionably suggests that an employer is liable for knowing hire where its agents "allowed the aliens to work with full knowledge that they were undocumented." Compl. Brief at 20. In contrast, however, I do not find that the crewleaders "hired" farm laborers as distinct from introducing them to Respondent who undertook a daily verification process at the compound. Most critically, the payroll records do not show that either Pedro Pedro or Bolano Deras ever performed any service or labor or received wages or other remuneration. See 8 C.F.R. §§274a.1(c)and (h).

I find that the employer as a matter of routine has relied on its crewleaders/bus owner-drivers to deliver laborers. The crewleaders are in effect paid commissions per head for delivering farm laborers to the compound. Respondent makes an effort to verify that the individuals named on the list have proper identification and authorization for work. Although a farm representative verifies documents against the names of crew members, the success of the verification process may be imperfect. This is understandable considering the hectic character of the operation, some 800 people milling about the two acre compound, with the buses typically remaining at the compound less than a half an hour. Nevertheless, the reasonableness of that effort may be measured by the relatively low percentage of unlawful employees found on October 27 and November 22.

While Agent Zetts understood Haley to have said that the crewleaders hire laborers subject to approval, Haley testified that only the family and management personnel effect hires. The

distinction is semantic, and as appears time and again in the record, Haley's nomenclature, colorful as it is, is not always precise. I do not understand that the crewleaders engaged the laborers, but rather introduced them to DuBois Farms for processing.

Management was aware that at least some of its owner-driver crewleaders may have been less than circumspect in ferreting out imposters. Also, some people hid under the seats of the buses to get to the fields. The record does not make clear whether crewleaders had knowledge that any particular individual was undocumented or had assumed a false identity. That a crewleader was not dismissed when management discovered an illegal working on a crew may reflect Respondent's need for farm laborers and for crewleaders. Management's tolerance of the status quo, however, does not enhance the quality of Complainant's proof.

For all these reasons, I cannot conclude that Respondent employed the two individuals within the meaning of Complainant's definition of an employer as a "person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration." 8 C.F.R. §274a.1(g). No activity prior to concluding the daily processing, i.e., verifying the passengers each morning, segregating them by identification and documentation, and subjecting them to approval for employment by an official authorized to hire laborers, is a hire or creates an employment. Even assuming that the crewleaders had hiring authority, proof is lacking that Respondent employed the two individuals. I find the circumstantial evidence insufficient to sustain INS' burden to establish these two aliens as employees of Respondent.

4. Unlawful employment charges dismissed

As discussed above, I dismiss the charges of unlawful hiring of Pedro Pedro and of Bolano Deras enumerated as ##1 and 2 to Exhibit A of the NIF incorporated into the Complaint.

As to the alternative charge of continuing to employ, INS suggests on brief that an employer not found to have had the requisite knowledge to establish a knowing hire violation can be found liable for a knowingly continuing to employ violation, "having learned the unauthorized status of the employee after the date of hire. Mester, [1 OCAHO 18]." Compl. Brief at 33. While the distinction between the two charges is accurately described, the reference to Mester confuses analysis in the present case.

Unlike Mester, there was no notice to Respondent which intervened after the supposed hire to put it on notice of the unauthorized status of alleged employees. Here, if I were to conclude that Complainant had proven employment of these

individuals, there is no evidence of any event after the supposed hire to inform the employer of the aliens' unauthorized status which it did not know at the time of the alleged hire. To the extent, therefore, that there is no finding of liability for a knowing hire of an unauthorized individual, certainly there is no evidence to support a knowingly continuing to employ violation.

Dismissal of the unlawful employment charges does not result from a total lack of corroboration for the documentary materials as we have the testimony of the arresting officers who made entries on the I-213s and took the statements from the aliens. The corroboration that is lacking is that the names given by the aliens do not show up on the payroll and nothing confirms their identity; there are no fingerprints, no law enforcement agency identification records, no personal or other I.D. If, as Agent Zetts believed, people work under aliases, INS can prevail only by charging and proving employment of individuals known to management. It simply cannot be the case that Congress anticipated civil liability of employers who, no more or less than INS, are duped by unauthorized aliens.

The result here is consistent with the purpose of IRCA. By requiring formal adversary proceedings, 8 U.S.C. §1324a(e)(3)(B) reflects the policy judgment that employers are to be afforded effective procedural due process. The process that is due does not permit a finding of liability absent credible evidence of employment. There is no suggestion on this record that Respondent was in conspiracy with or otherwise aware of the identity of the two aliens. In the circumstances here, credible evidence must be something more than unsupported statements by individuals who concede to be in the country illegally and thought by INS to have obtained access as imposters to the alleged employment.

B. Paperwork Violations

All ninety-four employment eligibility verification, paperwork charges, allege failure to prepare, present, or maintain the Form I-9 in violation of 8 U.S.C. §1324a(2)(b)(1).[4]

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4 Agent Zetts testified that in addition to the failure to prepare and present, over two hundred Forms I-9 were improperly completed. INS elected not to charge Respondent for such violations, and as stated at hearing, I will not take such claim of uncharged violations into account. Tr. 352.

To clarify the record, the spelling of names in Exhibit B of the NIF, in contrast to the spelling of names in the exhibits and in Respondent's brief, is adopted in this Decision and Order.

Complainant suggests on brief that Respondent stipulated failure to prepare or present Forms I-9 for certain individuals listed on Exhibit B to the NIF, referring to the telephonic prehearing conference of December 6, 1990 and the Border Patrol letter to Respondent's counsel dated February 6, 1991. However optimistic the parties and the judge may have been, Second Prehearing Conference Report and Order (December 10, 1990), at paragraph 1, no stipulations were forthcoming beyond those summarized at pages 3-4 of Complainant's brief, and as recited on the hearing record. As a result, without conceding legal liability for paperwork violations, Respondent agreed that the individuals named at ##7 through 94 of Exhibit B were its employees hired after November 6, 1986 for employment in the United States.

In context of the February 6 letter, albeit with less than perfect clarity, at hearing Respondent also agreed that with the possible exception of #81, Jose Diaz, no I-9s were presented by DuBois Farms on December 15, 1989 or ever, with respect to 14 individuals, ##16, 23, 28, 53, 55, 69, 70, 71, 72, 78, 80, 81, 85, 86, and 87. I understand from the colloquy, however, that Respondent did not stipulate as to another category in that letter, pertaining to individuals ## 52, 54, 62, 68, 77, 79, 82 and 83, leaving Complainant to its proof. Tr. 11.

Respondent asserts various defenses to the alleged violations enumerated in this decision: (1) that Respondent never hired for employment the six individuals alleged to be unauthorized; (2) that INS had knowledge that 49 of DuBois Farms Forms I-9 were in the possession of the FFVA at the time of the inspection; (3) that ten of the individuals listed as violations worked not more than one day; (4) that seventeen of the Forms I-9 were in fact presented by Respondent at the time of the inspection; (5) that five of the alleged violations are the result of the I-9s having been misplaced or lost, and that (6) the remaining seven unaccounted for I-9s be treated as de minimus.

1. The six undocumented aliens

Violations numbered 1 through 6 pertain to persons unauthorized for employment in the United States. Individuals 1 and 2 are the persons listed in Exhibit A as having been unlawfully employed. For proof as to each of the four aliens at 3 through 6, INS introduced the Form I-213 Record of Deportable Alien. Exhs. A, D, R and T. As to #3, Luis Juan Sebastian, INS introduced Form I-215B Record of Sworn Statement in Affidavit Form, and Form I-263C Record of Sworn Statement in Administrative Proceeding. A Form I-215B was also introduced for #4, Miguel Juan Martin. Only Forms I-213 were submitted as to #5, Manuel Manuel Cruz and #6, Alonzo Joaquin Perez. INS did not charge Respondent with unlawful employment as to these four individuals.

Respondent claims that it never hired any of the six. As already discussed, Complainant has failed to sustain its unlawful employment charges as to Pedro Pedro and Bolano Deras, finding that no employment relationship was established. It follows that Respondent had no duty to complete Forms I-9 for them. See U.S. v. Charo's Restaurant, OCAHO Case No. 90100149 at 8-9 (8/29/91). (no requirement to present Form I-9 where the individual is found not to be an employee).

I find the circumstantial evidence insufficient to sustain the burden of establishing these four aliens as employees of Respondent. Such evidence consisted of the documentary materials, remarks of unidentified bus drivers, and that the aliens arrested were taken off buses leaving the DuBois Farms compound. As with the first two aliens, the names of the other four do not appear on Respondent's payroll.

As early as Mester, 1 OCAHO 18, I dismissed an unlawful employment charge where the alleged employee did not appear in the records of the respondent. That decision recognized the insurmountable burden that employers face, having to prove a negative when confronted with charges under 8 U.S.C. §1324a of employing individuals whose identity cannot be confirmed from that employer's records and accounts. Here, as there, the employer is not "shown to have maintained a cash payroll and there is no implication that the respondent's books have been cooked to frustrate either employer sanctions or another law enforcement program." 1 OCAHO 18 at 27. Here, the employees are paid by check; there is no suggestion that the books and accounts are false.

The INS documents are no more credible as to these four than for Pedro Pedro and Bolano Deras. Three of the aliens claimed hourly wage rates different from the $3.75 paid to field laborers. The one who scored the correct pay rate, Miguel Juan Martin (#4), claimed to have picked "chilis," a crop arguably included within the range of Respondent's produce, i.e, peppers, primarily but not exclusively bell, eggplant and cucumbers.

The DuBois Farms compound, according to its general manager, is located in Boynton Beach Florida; there are no DuBois Farms agricultural operations in Lantana, Lake Worth or Delray Beach, Florida. The apprehensions on both October 27, 1989 were immediately outside the compound. Yet, Agent Toth said, "I call it Lantana. . . ." Tr. 48. The I-213 he endorsed for Luis Juan Sebastian shows Lantana as the location for the apprehension. Forms I-213 endorsed by Agent Kueber for Miguel Juan Martin, and by Agent Payne for Manuel Manuel Cruz and Alonzo Joaquin Perez identify the point of apprehension as Lake Worth. Agent Zetts who endorsed the I-213 for Bolano Deras also cited Lake Worth. These five aliens were all arrested at the same time and place.

[illegible] than a month later, when Zetts endorsed the I-213 for [illegible] who was also taken off a bus leaving the same [illegible], the point of apprehension shows up as Delray Beach. It [illegible] matter of indifference to casual travelers or even farm [illegible] whether they are knowledgeable or concerned as to [illegible] among jurisdictions, but not to law enforcement [illegible].

[illegible] inconsistencies continue. Of the five aliens arrested on [illegible], the I-215B of Martin recites he worked only in [illegible] the I-215B for Sebastian is silent as to any employment, [illegible] I-263C is silent as to location of employment; but, the [illegible] for Bolano Deras states he worked only in Boynton Beach. [illegible] Quarter 22 Pedro Pedro I-215B says he worked only in Delray [illegible]. There are no affidavits for Perez and Cruz. Although both [illegible] arrested at the same time and place, the I-213 for Perez [illegible] that he was enroute to work when arrested; the I-213 for [illegible] that he was working for DuBois Farms. Another example, the [illegible] of Martin, which recites that he was arrested, "while going [illegible] on a DuBois Farms truck," is contrary to the testimony of [illegible] arresting agents, that as with the others, he was taken off a [illegible]. Exh. D.

Failure of the agents to acknowledge inaccuracy does not [illegible] concern for the veracity of the documentary materials. [illegible] INS agents assigned to a particular geographic area are as inconsistent and imprecise in describing locations as appears in the documentary materials requires me to disregard the Forms I-213 and related affidavits entirely. One can only speculate as to the source of the entries.

As the buses left the compound for the fields, they had on board not only employed field laborers, but also individuals rejected for employment because they lacked work authorization. The resulting mix of the passenger population sufficiently diminishes the credibility of the documentary materials as to render them worthless. Clearly, INS would have had an easier task, if, for example, the agents had found the aliens at work [illegible]tions, (Mr. Z Enterprises, 1 OCAHO 288), introduced testimony [illegible] no Real, 1 OCAHO 307 (3/23/91)), or [illegible]e of another's name that appears on the [illegible]oyer (Mester, 1 OCAHO 18[illegible].

2. INS knowledge of Forms I-9 in the possession of FFVA

Respondent contends that I-9s for forty-nine (49) of the paperwork violations were prepared by and in the possession of the FFVA at its headquarters in Orlando, Florida at the time of the December 1989 inspection.[5] Exh. 3. Respondent does not claim that any of the 49 were presented at the inspection. The issue is whether INS was informed at the time of the inspection that I-9s were located elsewhere, and, if so, whether the employer had the burden of arranging for the inspection of those other I-9s.

The regulation governing the inspection of Forms I-9 provides that "[a]t the time of inspection, the Forms I-9 must be made available . . . at the location where the request for production was made. If the Forms I-9 are kept at another location. . . ." the employer "must inform the . . . Service officer of the location where the forms are kept and make arrangements for the inspection." 8 C.F.R. §274a.2(b)(2)(ii). Literally read, the regulation suggests that the employer must both (1) inform the INS officer of I-9s at the other location and (2) make arrangements for inspection of those documents.

Agent Zetts admitted that Haley advised him of Respondent's FFVA contract for completion of Forms I-9. Zetts also claimed, however, that Haley told him that all of the Forms I-9 were in his possession, but that FFVA had "duplicates." Tr. 193. At the inspection Haley also gave Zetts a December 13, 1989 printout of the most recent verifications by FFVA. Although the bulk of the names on the printout are not implicated in this case, INS clearly was on notice of FFVA involvement with DuBois Farms I-9 processing. In Complainant's view, even if Zetts knew FFVA was Respondent's agent for I-9 processing it was incumbent on DuBois Farms to advise Zetts of the location of the additional I-9s and make arrangements for their inspection.

Whatever misunderstanding there may have been between Haley and Zetts concerning the I-9 inspection, it is undisputed that Al Helm as President of FFVA had earlier telephoned Assistant Chief Patrol Agent Sheehy. Sheehy knew that Helm was calling about the prospective audit of the DuBois Farms I-9 forms. Helm testified that Sheehy advised him that there was "no problem" with FFVA's retention of some of the forms I-9. Tr. 388-89. Agent Sheehy did not recall making that statement. Although he knew Respondent had never before been through the I-9 audit process, he nevertheless

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5 Violations ##15, 19, 20, 21, 22, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 73, 74, 75, 81, 84, 88, 89, and 90.

[illegible] Helm as to what should be done with DuBois Farms' [illegible] possession of FFVA. Tr. 343, 345.

[illegible] conversation with Sheehy, Helm called Haley, [illegible] him that there would be no problem with the I-9s in the [illegible] of FFVA. From seminars previously conducted by INS, [illegible] the opinion that if INS wanted to inspect the [illegible] an agent would either inspect them at FFVA in Orlando, [illegible] them. Tr. 391. Not having been advised of the [illegible] between Helm and Sheehy, Zetts was unaware of the [illegible] and did not know that any of the documents were in the [illegible] of the FFVA.

The INS "Field Manual for Employer Sanctions" (1987) states in [illegible] 8-2-f:

> If an employer indicates that the I-9 Forms are maintained at a distant location, such as a central office in a different state, supervising officers should ensure that contact is established with the Service office having jurisdiction over that location, and request that an auxiliary case be opened to ensure completion of the pending matter. . . .

The Manual suggests that where the supervising officer, e.g., Agents Sheehy or Zetts, obtains an indication from the employer that I-9s are maintained in a distant location out of state, a request should be made to the INS office with jurisdiction over that location. A fortiori, where FFVA, through Helm on behalf of DuBois Farms, so informed Sheehy of the distant location of some of Respondent's I-9s, INS, by application of its own policy became obliged to make further effort to review those I-9s.

Q: (Counsel for Respondent) When Mr. Helms (sic) called you and he told you that he had some of the files but not all of the files, did you tell him what to do with those files?

A: (Agent Sheehy) No, he said they may have some.

Q: Did you suggest what he should do with them?

A: That's not my position to tell Florida Fruit and Vegetable what to do with their records.

Q: Did you tell him that you would be requesting those files or someone would?

A: No, I didn't. We subpoena the actual grower himself.

Q: Isn't it true that you said that it was not a problem.

A: No, I don't recall that.

Tr. 343.

Even more revealing is the admission by Sheehy that as early as his conversation with Helm before the day of inspection he anticipated that, "a claim would be forthcoming at the time of the inspection and that there would be several I-9's or a number of I-9's missing and that Florida Fruit and Vegetable would be blamed for the lack of I-9's." Tr. 341. Inquiry from the bench prompted this reply by Agent Sheehy:

> Well, your Honor, the fact that a large number of employees was mentioned, the fact that he said that they had just started completing I-9's led me to believe that at the time of the inspection, a number, quite a number of I-9's may not be presented and there would be a claim made that Florida Fruit and Vegetable had those I-9's in their possession, when in fact they probably did not.

Tr. 340.

However reasonable it may be in the abstract for INS to keep its sights solely on the grower, given the acknowledgement that, at a minimum, it was anticipated that a claim would be made and that "quite a number" of I-9s were at FFVA, it is unconscionable that INS failed to exploit the opportunity to examine that paperwork located in the FFVA Orlando office.

It does not require proof of entrapment to conclude here that Respondent is not culpable for its failure to present the I-9s in FFVA's possession. Without rejecting Sheehy's testimony, his discussion with Helm and his reaction to it, as he candidly explained at hearing, reinforced by Haley's handing over the FFVA contract to Zetts, is sufficient to have passed the burden of further inquiry to INS. The regulatory provision for an "arrangement" cannot be understood to require a meeting of minds or an explicit agreement where, as here, such a hurdle would leave the employer vulnerable to liability for failing to effect an arrangement, despite having put INS on notice that some I-9s were located elsewhere. As applied here, I understand the regulatory requirement to imply sufficient notice to INS as would reasonably alert it to the availability of I-9s, the inspection of which can then be arranged.

I find by a preponderance of the evidence that Respondent sufficiently communicated to INS a reasonable basis for concluding that I-9s were located at FFVA. This case is distinguished from U.S. v. Cafe Camino Real, 1 OCAHO 307 at 13-14. In Cafe Camino Real the judge rejected on credibility grounds the employer's defense that duplicate I-9s were available at another location, finding he was either untruthful, or had ineffectively communicated that fact to INS. Unlike that case, the I-9s admitted here do not appear to have been fraudulent, and the individual in possession of them, Al Helm, took the stand and vouched for them. They all bear the FFVA signature, and are dated before the inspection.

I withhold liability and dismiss these charges not as a matter of equity but of law. INS knew FFVA was in the picture, and that a claim would be forthcoming that FFVA had I-9s for DuBois Farms. Nonetheless, INS made no effort to alert Respondent to the opportunity to arrange or itself to arrange to inspect the I-9s. Even if INS suspected the claim was a bluff, its duty as a public agency was to respond in a reasonable way, and not to dissemble, saying it is "not my position to tell [FFVA] what to do with their records." Tr. 343.

INS owed a higher standard of care to DuBois Farms before writing off the I-9s in the possession of FFVA. I cannot find DuBois liable for failure to present I-9s but rather that INS willfully omitted them from its inspection. Respondent has sustained its burden of establishing by a preponderance of the evidence that the ostensible I-9s FFVA prepared were available on the date of inspection in quittance of Respondent's obligation to comply with I-9 requirements. See U.S. v. Alvand, OCAHO Case No. 90100201 (7/8/91), modified by CAHO at 5-6 (8/7/91) (burden of proving affirmative defense by preponderance of the evidence).

As noted at hearing, the names of several [illegible] individuals for whom FFVA signed I-9s (Exh. 3) but [illegible] to INS after the December 15, 1989 inspection, are not [illegible] the same as on Exhibit B to the NIF. Tr. 406. [illegible] discrepancy would seem to be included within the [illegible] INS at hearing that "there seems to be no indication that [illegible] the documentation which was submitted to us is faulty [illegible] way falsified or incorrect in any way." Tr. 13. [illegible] however, my review suggests that modest differences [illegible] generally may be explained by variants on the practice [illegible] Hispanics are identified by their parents surnames, [illegible] maiden/married names, e.g., Domingo Lucas Reymundo (#[illegible] and Domingo Lucas (Exh. 3); Vitalina Hernandez (#29), [illegible] Velasquez (Exh. 3). Additionally, Mario Gaspar Francisco [illegible] appears in Exhibit 3 as Gaspar Francisco with two I-9s, [illegible] different individual, presumably reflecting Respondent's [illegible] find a match for the individual listed on the NIF.

One individual, Andres Pascual Sebastian (#61), [illegible] included in the compilation of FFVA prepared forms. [illegible] Helm's testimony (Tr. 416-418) as to completion of a timely [illegible] I-9, omission of that form in evidence warrants a finding [illegible] of Complainant as to that charge.

3. One day workers

Respondent asserts that ten of the individuals listed on Exhibit B to the NIF were terminated on the first day that they worked for Respondent: #69 Samuel Navarro, #70 Rodolfo Espinosa, #71 Raul Saucedo, #78 Jesus Ruiz, #80 Noe Langoria, #82 Mayron Solis, #83 Isidoro Ganzalez, #85 Jose Godinez, #86 Guadalupe Rico, and #87 Rafael Salazar. It is undisputed that no I-9s were prepared or produced for these individuals at the time of inspection. Nine of the ten individuals were discharged by Respondent for having come to work under assumed names, one, #83, was found by Respondent, "in the field without going through the procedure. . . ." Tr. 637-638. INS does not refute that they worked one day or less. Respondent claims that never having authorized their employment, it is not required to prepare I-9s for them.[6] Complainant contends that Respondent's defense fails because it paid them for the hours worked.

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6 I do not understand that the stipulation between the parties precludes judicial inquiry into the employment status of these individuals, particularly in the face of Respondent's persistent argument that the individuals were not in fact hired for employment. See Charo's Restaurant, OCAHO Case No. 90100149 at 8-9 (where no employment existed judge found in favor of employer, even though respondent's filings assumed incorrectly that a finding had been made in favor of complainant).

By Order dated September 6, 1990 I struck Respondent's affirmative defense that an employer avoids I-9 liability per se where an employee has worked fewer than three days. INS argues that an employer has an obligation to complete both sections 1 and 2 of the Form I-9 by the end of the first day if an employee is hired for less than three days (8 C.F.R. §274a.2(b)(1)(iii)) and Respondent is, therefore, liable for not having prepared I-9s at all.

It is necessary to determine whether these individuals were hired by Respondent; if so, the expected duration of their employment, and the consequential I-9 obligation.

Complainant asserts that they were hired by crewleaders, agents of Respondent, who had knowledge of their illegal status, a hiring and knowledge to be imputed to the principal.

As previously addressed, while the crewleaders at least tacitly exercised de facto authority to introduce new persons to DeBoer Farms, I am not prepared to find that their conduct constituted hiring. No activity prior to concluding the processing is a hire, in light of Respondent's routine of checking on the passengers each morning, segregating them by identification and documentation, and subjecting them to approval for employment by an official authorized to hire laborers.

Assuming, however, that these ten individuals were hired, the operative language to establish liability is failure to prepare a Form I-9 "at the time of hiring." The governing regulation at the time of this action, and subsequent to the amendments of the Immigration Act of 1990, require a long-term employee to sign section 1 of the I-9 "at the time of hiring."

The term hire is defined as "the actual commencement of employment of an employee for wages or other remuneration." ding to Respondent, these ten Although they worked and were of persons who were on the I-9s had been completed; one ocess.

First, that an I-9 must be completed when an offer of employment is accepted, even if it is days or weeks before starting work. Second, INS preferred meaning of the phrase, i.e., that an I-9 must be completed at the moment an employee "reports for work." Third, a reasonable time after the employee begins to work. ABC Roofing, OCAHO Case No. 89100389 at 16.

In ABC Roofing an individual was hired as a roofer on the jobsite and worked one eight-hour day. He never completed section 1 of the I-9, although the employer had completed section 2 in anticipation of the employee's presentation of documents demonstrating employment eligibility. He was paid for one day of work without completing the Form I-9. He never returned to work for the employer. The judge held that "[w]hen employees are hired in the field . . . the meaning of the (time of hiring) rule becomes more unclear. It may be physically impossible to carry out the task of completing an I-9 at the moment the employee reports for work. In that circumstance, . . . a reasonableness rule seems more sound." Id. at 17.

Moreover, "[w]hen a jobsite hire is combined with a prompt quit, as here, the employer's efforts to comply with IRCA, . . . is easily frustrated. In that situation, the INS' 'report for work' interpretation has little, if any, likelihood of being met." Id.

I find Respondent's personnel operation to be functionally similar to that in ABC Roofing in the sense that the processing at the DuBois Farms compound is tantamount to jobsite hires. Respondent's witnesses testified to its procedure in hiring workers. The record is clear that once Respondent discovers that an individual has assumed a false identity and is utilizing another's documents, or otherwise has not been processed, that individual is removed but paid for the hours worked under his or her given name. The testimony of Haley is unrebutted that it is Respondent's understanding that the United States Department of Labor, Wage and Hour Division, requires that individuals be paid under their legal name for labor performed.

The posture of an employer that, confronted with fraud by putative employees utilizing false identity documents or slipping into the workforce, discharges them the first day they are on the job, is functionally comparable to that of an employer whose new hire has disappeared after the first day. Here, consistent with OCAHO precedent, at least a one day window should remain open for the employer to complete the Form I-9.

It is unrealistic to require a Form I-9 to be completed in every situation where a presumptive employment relationship results from the actual provision of labor. It is also unreasonable to require an I-9 where the employer terminates the relationship effective the first day of work, paying the

[illegible] for work performed on the assumption there is a legal [illegible] to pay for the labor performed. Even if I were to find [illegible] complainant has established that these laborers had been [illegible] within the meaning of the regulation, I am not persuaded [illegible] verification retention requirements may be imposed. The CAHO [illegible] Seeking Restaurant held the rule for the preparation of [illegible] at the Form I-9 "at the time of hiring" is too ambiguous [illegible] enforcement according to its terms. 1 OCAHO 329. I [illegible] that holding, and make a similar finding here with respect [illegible] preparation and presentation of the I-9.

[illegible] public policy of enforcing employment eligibility [illegible] requirements is not aided by imposing liability with [illegible] to these individuals. That policy is encouraged, however, [illegible] penalizing an employer, whether or not it paid for work [illegible], that has by prompt diligence separated from its [illegible] on the first day of service individuals found to have [illegible] access through pseudonyms or other evasions. At least in [illegible] absence, as here, of any proof that the employer tailors its [illegible] to defeat I-9 procedures, I do not find that IRCA [illegible] liability for failure to prepare, present and maintain an [illegible] I-9 in such an instance. ABC Roofing, OCAHO Case No. [illegible] at 16. It begs credulity to assume that employers will [illegible] employees and then fire them after one day in a systematic [illegible] to circumvent I-9 requirements.

I reject as a categorical defense the proposition that a hire [illegible] does not survive beyond one day cannot as a matter of law be the subject of employer liability for paperwork completion. Nothing in this case prompts me to modify my judgment on that score as recited in the September 7, 1990 Order on Affirmative Defenses. On the record, however, payment for labor of the ten individuals did not require compliance with the I-9 process. Accordingly, I dismiss the ten charges relating to violations numbered 69, 70, 71, 78, 80, 82, 83, 85, 86, and 87.

4. Forms I-9 allegedly presented at the inspection

Respondent asserts that seventeen of the Forms I-9 listed as violations in Exhibit B of the NIF, i.e., numbers 7 through 14, 17, 18, 39, 47, 76, and 91 through 94, were in fact presented to Agent Zetts at the December 15, 1990 inspection. Exh. 2. DuBois Farms argues that Zetts overlooked them in the mass of 8,000 to 12,000 pages of documents presented. It is undisputed that he had thousands of documents to review, and did not keep copies of them all.

Zetts had extensive employer sanctions enforcement experience, conducting more than one-hundred I-9 inspections and completing over fifty Notices of Intent to Fine. Nonetheless, Haley's testimony on voir dire examination by INS counsel was steadfast

that he and Gilmond had examined the files on return from INS and found the I-9s for these individuals.[7] Haley's credibility is underscored by his very practical explanation of the reason he and Gilmond reviewed the files "to bring them back into some facsimile of order." Tr. 552. Also, having been informed, correctly or not, that some of the original I-9s had been retained by INS, he wanted "to determine where Mr. Zetts was going with this," to find out which I-9s might have been kept by INS, what the "pattern might be." Tr. 554. Referring explicitly to two long-term employees, James Miller (#8) and Linda Smith (#92), and to the others generically, Haley "was doubly flabbergasted" to find them included in the NIF of January 17, 1990, just 12 days after getting the files back from INS, "and they were -- the originals was still in the box." Tr. 554.

The opinion in ABC Roofing, explicitly affirmed in this respect by CAHO, is instructive. Finding in favor of the defense that a particular I-9 had been overlooked by INS, the judge said, "[I]t is highly improbable that one would remember the 'non-existence' of a fact, particularly when one, such as [the INS agent], was collecting large numbers of similar documents, specifically I-9's and wage records." OCAHO Case No. 89100389 at 20. Commenting that the testimony of witnesses on both sides, "suffer infirmities," the judge stated that, "I rely upon more objective facts in reaching my conclusion." Id.

Although Agent Zetts testified that he reviewed the employee files not less than three times, he did so without assistance. The record does not impeach Haley's testimony that these I-9s had been included in those returned by INS. Each one that is dated bears a date prior to the inspection. The extent to which any one of them may be less than perfect is immaterial, the issue here is one of presentation, not completion.[8]

As to Candelaria Mejia (#18), despite the earlier recognition of variants in names, I find no I-9 in Exhibit 2. Instead, the exhibit contains Forms I-9 for two individuals: Gonzalo Venegas Mejia and Miguel Candelaria. While there is some resemblance, neither name is substantially similar to that of "Candelaria Mejia." It has not been suggested that INS incorrectly copied the names of employees. I, therefore, find in favor of INS on this charge.

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7 INS claims on brief that Haley did not examine these I-9s until November 1990, citing the transcript at pages 551-552. These references, to the contrary, focus on dates in proximity to return of the files and receipt of the NIF.

8 Respondent should be alert in the future to more exact compliance with respect to completing the forms, e.g., many of the I-9s in Exhibit 2 contain deficiencies.

In addition, although identified in the index to Exhibit 2, no I-9s are in evidence with respect to Mario Cortez (#13) and Gladys Ruth Naves (#91). Respondent conceded as much on brief. Resp. Brief at 27. Although Respondent undertook to provide such I-9s at hearing, they are not in evidence. Consistent with the disposition of #61, the failure to supply the relevant Forms I-9, provides the basis for finding in favor of INS on these two charges.

Although Respondent might have supplemented its proof, it has made a showing that I-9s prepared before the inspection were returned to it by INS. Aside from the three charges discussed above, I find by preponderant evidence, therefore, that Respondent has made out a plausible case that INS simply failed to account for these forms, and dismiss the charges as to those named employees.

5. Lost or misplaced Forms I-9

Respondent's defense to violations numbered 16, 23, 28, 54 and 72 is that the employee records contain documentation sufficient for the preparation of Forms I-9. Respondent hypothesizes that by inadvertence of either party or during the auditing process these forms were lost or misfiled after they were delivered for inspection. Respondent, however, did not prove that the I-9s had been prepared. Respondent relies on extracts from employment files which reflect payroll data. Only for #16, Evelio Oscar Mungia (Exh. 4) is there any indicia to suggest that documents to satisfy IRCA may have been obtained. Absent any testimonial confirmation that I-9s were prepared, even as to Mungia, I do not share Hayley's speculation that I-9s had been presented at the time of inspection. Tr. 611.

68, 77 and 79.[9] Respondent offers no evidence in rebuttal to Complainant's prima facie showing that I-9s were not produced for these acknowledged employees. Instead, Respondent asks rhetorically whether "a 100% accuracy requirement [is] ever realistic in a work force made up of thousands of workers, many of whom have worked under different names and many of whom work only a few days during an agricultural season?" Resp. Brief at 46-47. The answer is that the judge cannot as a legal matter overcome responsibility of the employer for failure to comply with judicial understanding of the statutory and regulatory requirements. Cf. ABC Roofing, OCAHO Case No. 89100389 at 26-27, (refusal by judge to find liability where, inter alia, the violations were "very minor,") modified by CAHO on other grounds, at 4-5 (8/26/91) (INS request for review on this issue withdrawn).

Any practical good faith demonstrated by Respondent warrants consideration within statutory parameters as to the quantum of the penalty, not to establishing liability. As in Avland, OCAHO Case No. 90100201, modified by CAHO at 9, Respondent cannot prevail where it "did not present any evidence, testimonial or otherwise,

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9 At hearing I directed that post-hearing briefs contain proposed findings of fact and conclusions of law, "and that on reply briefs, each party will be expected to state with respect to the other party's proposed findings and conclusions whether they are agreed or disagreed as to each . . . and to the extent they disagree to . . . state an explanation." Tr. 694. Failure of both parties to file reply briefs which could have narrowed the issues has made more difficult the task of understanding their respective and opposed versions of the facts. As described by counsel for DuBois Farms, on the second day of hearing, "I've handled more paper today than in a single lifetime." Tr. 543.

This is not the first misshaped mass to be addressed:

> Hamlet: Do you see yonder cloud that's almost in shape of a camel?
>
> Polonius: By the mass, and 'tis like a camel indeed.
>
> Hamlet: Methinks it is like a
>
> Polonius: It is backed like a weasel.
>
> Hamlet: Or like a whale?
>
> Polonius: Very like a whale.

William Shakespeare,
Hamlet, Act III, scene ii

show that the Forms I-9 were ever completed." See U.S. v. Integral Computer Technology, OCAHO Case No. 90100316 (8/20/91), modified by CAHO at 5 (9/19/91) (where facts are conceded to establish paperwork violation, judge lacks discretion to avoid finding of liability, de minimus considerations being relevant only to the quantum of penalty). INS having alleged the failure to present I-9s for individuals who Respondent did not deny were subject to employment eligibility verification, no defense on the merits appearing, I find in favor of Complainant on these seven charges.

V. CIVIL MONEY PENALTIES

As appears from the foregoing discussion, I have found Respondent liable for 16 paperwork violations, having dismissed both unlawful employment and 78 of the paperwork charges. Civil money penalties for paperwork violations must be assessed "in an amount of not less than $100 and not more than $1,000 for each individual as to whom such violation occurred." 8 U.S.C. §1324a(e)(5).

In determining the quantum of penalty I am obliged to consider the five factors prescribed at 8 U.S.C. §1324a(e)(5): size of the employer's business, good faith of the employer, seriousness of the violation, whether or not the individuals involved were unauthorized aliens, and history of previous violations. In the first administrative adjudication under 8 U.S.C. §1324a(a)(1)(B) I applied the five factors on a judgmental basis. U.S. v. Big Bear Market, 1 OCAHO 48 (3/30/89), aff'd, Big Bear Market No. 3 v. INS, 913 F.2d 754 (9th Cir. 1990).

In U.S. v. Felipe, Inc., 1 OCAHO 93 (10/11/89), the judge applied a mathematical formula to the five factors in adjudging the civil money penalty. On administrative appeal, the Chief Administrative Hearing Officer (CAHO) commented: "This statutory sion does not indicate that any one factor be given greater CAHO 108, at 5 (11/29/89). The CAHO le the formula utilized by the not to be understood as the aith with the five statutory consistent with that understanding, I have traditionally utilized a judgmental approach, considering each of the five factors in respect of any paperwork violation. Cafe Camino Real, 1 OCAHO 307; U.S. v. J.J.L.C., 1 OCAHO 154 (4/13/90); U.S. v. Buckingham Limited Partnership d/b/a Mr. Wash, 1 OCAHO 151 (4/6/90).

Generally, I will consider only the range of options between $100 per individual, the statutory minimum, and the amount assessed by INS. Cafe Camino Real, 1 OCAHO 307 at 16; Big Bear, 1 OCAHO 48 at 32; J.J.L.C., 1 OCAHO 154 at 9. I have suggested that if facts are developed at hearing that do not appear to have

been reasonably anticipated by INS in assessing the penalty, I may determine that those factors justify increasing the penalty. Cafe Camino Real, 1 OCAHO 307 at 16.

INS assessed $500 each for the violations with respect to Bolano Deras and Pedro Pedro, $400 each for the four other undocumented aliens, and the remaining seventy-eight violations at $200 per person. Agent Sheehy explained how he applied the statutory criteria to the paperwork charges in determining the amount assessed against DuBois Farms. Because this Decision and Order has found against Complainant on a number of those charges, I express no judgment as to the propriety of those assessments. Rather, the only assessments at issue are those with respect to individuals as to whom Respondent has been found to have been in violation of paperwork requirements and listed on Exhibit B to the NIF, as follows: ## 13, 16, 18, 23, 28, 52, 53, 54, 55, 61, 62, 68, 72, 77, 79 and 91.

Respondent is a relatively large enterprise, comprising an extensive vegetable growing operation with a payroll of almost two million dollars for the quarter ended December 31, 1989. Exh. Q. Respondent hires approximately 1200 new employees over a twelve month period. As Agent Sheehy recognized, "[t]here are inherent difficulties in paperwork involved with a large operation of this type." Tr. 352. Cf. Cafe Camino Real, 1 OCAHO 307 (family run restaurant is a small sized business); U.S. v. Cuevas d/b/a El Pollo Real, 1 OCAHO 273 (12/3/90) (small size of business mitigates amount of penalty).

In assessing the seriousness of the violations, I agree that failure to prepare or present Forms I-9 is serious, more so for example than failure to properly complete the form. U.S. v Huang, 1 OCAHO 300 at 4 (2/25/91). Penalties, however, must be tempered by recognition that DuBois Farms has been found to have failed to prepare and present Forms I-9 for 16 hires out of a payroll approximating 4900 new hires, 6800 employees in all, during the period November 6, 1986 to December 1989. Even as charged, only 94 new hires were implicated, 1.9% of total new hires.

I reject as uncharged and unproven any inference that were other IRCA violations during the period. Similarly, which this Decision and Order have dismissed on the merits part of the focus on civil penalties. It follows that wl aggregation of 16 proven paperwork violations is not minimized, their seriousness must be considered in context of all hires. Here, there is no suggestion of an utter fai comply with IRCA requirements. Cf. Cafe Camino Real, 1 OC at 16 (blatant disregard for the I-9 process). Responde demonstrated its diligence in effecting compliance in a le idyllic hiring environment. I hold that failure to presen I-9 must be considered in context of Respondent's entire pe operation, taking into account its efforts at I-9 comp including utilization of its FFVA resources.

Respondent has not demonstrated 100% compliance with I-9 requirements. For the reasons already stated as to seriousness, however, I am unable to find bad faith in its compliance program. Compared, for example, to Cafe Camino Real, this record is tantamount to good faith compliance. As held in Big Bear, 1 OCAHO [illegible] at 32, concerning negligent failure to prepare 132 Forms I-9 and to properly complete three others, out of a total payroll of 1100 employees:

> While not indicative of good faith, neither do they reflect callousness. To the extent that good faith is the obverse of bad faith, I find carelessness, and not disdain or such gross disregard of the employer sanctions program as to imply malevolence, a determination which is, in all, tantamount to good faith.

There is no evidence of prior violations, and none found of employment of unauthorized aliens. Considering the mass of employment documents, the hiring of large numbers, the nature and characteristics of the workforce as shown at hearing and Respondent's professed, unrebutted commitment to compliance, I assess the civil money penalty at the statutory minimum, i.e., $100 per violation for a total penalty of $1,600.

VI. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings, testimony, evidence, memoranda, briefs and arguments submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

3. That upon consideration of the statutory criteria for determining the amount of the penalty for violation of 8 U.S.C. §1324a(a)(1)(B), it is just and reasonable to require Respondent to pay a civil money penalty in the sum of $100 per violation, for an aggregate liability of $1,600.

4. This Decision and Order is the final action of the judge in accordance with 28 C.F.R. §68.51(a) (1990). As provided at 28 C.F.R. §68.51(a), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Decision and Order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it. See also 8 U.S.C. §1324a(e)(7), 28 C.F.R. §68.51(a)(2).

SO ORDERED.

Dated this 24th day of September, 1991.

Marvin H. Morse
Administrative Law Judge

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